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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/577,118	05/23/2000	Matt Odhner	MS1-517US	3081

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EXAMINER

CRAIG, DWIN M

ART UNIT	PAPER NUMBER
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2123

11

DATE MAILED: 06/17/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

09/577,118

Applicant(s)

ODHNER ET AL.

Examiner

Dwin M Craig

Art Unit

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 4-1-2004.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-41 is/are pending in the application.
- 4a) Of the above claim(s) 1, 26, 28 & 38 is/are withdrawn from consideration.
- 5) ☒ Claim(s) 9, 10, 27, 29-37 and 39-41 is/are allowed.
- 6) ☒ Claim(s) 2-8, 11-20, 24 and 25 is/are rejected.
- 7) ☒ Claim(s) 21, 22 & 23 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. §§ 119 and 120**

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_\_.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_.

### DETAILED ACTION

1. Claims 1, 26, 28 and 38 have been cancelled. Claims 2-25, 27, 29-37 and 39-41 have been presented for reconsideration in view of Applicant's amendments and arguments.

#### Response to Arguments

2. Applicants arguments filed on 4-1-2004 have been fully considered. Examiners response is as follows:

2.1 Regarding Applicants amendment to the specification to properly incorporate essential subject matter:

The Examiner thanks the Applicants for adding the correct non-provisional patent application number to page 3 of the specification however, the Examiner notes that the Application number the Applicant added is the same Application number as the current Application (09 577118), the Examiner believes that the Applicant wanted to amend the specification with Application number: (09 549816).

2.2 Regarding Applicant's Request for Clarification concerning Independent Claims 11 and 17:

The Examiner apologizes for not clearly addressing the status of these claims in the last office action.

Claims 11 and 17 are rejected; please see the following 35 U.S.C. 103 rejection.

2.3 Regarding Applicant's response to the 35 U.S.C. 103 rejections of Claims 1, 2, 4-8, 12-16, 18-28, 30-33 and 38:

Applicant argued:

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Applicant respectfully submits that claims 1, 2, 4-8, 12-16, 18-28, 30-33 and 38 are not unpatentable over the cited references and requests reconsideration.

The Examiner has found Applicant's arguments, in combination with the instant amendments, to be persuasive and withdraws the earlier rejections of those claims.

An updated search has revealed new art.

**Specification - Improper Incorporation by Reference**

3. The attempt to incorporate subject matter into this application by reference to one application (**page 3, specification**) is improper because there is insufficient identification, *because the serial number amended into the current application is the same as this pending application*, so as to direct the Examiner or future potential readers to the referenced material. Furthermore, if the current application issues as a patent before the referenced application, Applicants will be required to physically incorporate the incorporated material into the instant specification. Please refer to section 608.01(p) which recites:

Mere reference to another application, patent, or publication is not an incorporation of anything therein into the application containing such reference for the purpose of the disclosure required by 35 U.S.C. 112, first paragraph. In re de Seversky, 474 F.2d 671, 177 USPQ 144 (CCPA 1973). **In addition to other requirements for an application, the referencing application should include an identification of the referenced patent, application, or publication.** Particular attention should be directed to specific portions of the referenced document where the subject matter being incorporated may be found. Guidelines for situations where applicant is permitted to fill in a number for Application No. \_\_\_\_\_ left blank in the application as filed can be found in In re Fouche, 439 F.2d 1237, 169 USPQ 429 (CCPA 1971) (Abandoned applications less than 20 years old can be incorporated by reference to the same extent as copending applications; both types are open to the public upon the referencing application issuing as a patent. See MPEP § 103).

The application, entitled "Capacity Planning For Server Resources" listed on **page 3** of the specification, has the following serial number: 09/549816, it is requested by the Examiner that the Applicant amended the specification to include this particular Application serial number.

**Claim Rejections - 35 USC § 103**

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
  2. Ascertaining the differences between the prior art and the claims at issue.
  3. Resolving the level of ordinary skill in the pertinent art.
  4. Considering objective evidence present in the application indicating obviousness or nonobviousness.
4. Independent **Claims 3, 11 and 17** and dependent **Claims 12-14, 16, 18, 24 and 25** are rejected under 35 U.S.C. 103(a) as being unpatentable over **Bhat U.S. patent 5,668,995** in view of **Asawa U.S. Patent 6,108,800** and in further view of **Kutcher U.S. Patent 6,301,615** and in further view of **Dias et al. U.S. Patent 6,317,778**.

4.1 As regards independent **Claims 3, 11 and 17** the *Bhat* reference discloses a method for deriving server resource utilization estimates, recording server data, including server

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resource parameter values, using a load simulation tool, specifying a load, and determining the utilization based on that load (**Figures 2A, 2B, Col. 1 Lines 50-67, Col. 2 Lines 1-10, Col. 3 Lines 1-15, Col. 3 Lines 25-38, Col. 3 Lines 56-67, Col. 4 Lines 1-3, Col. 4 Lines 31-57**).

However, the *Bhat* reference does not expressly disclose a server cluster, and recording data during the operation of the server cluster or a cluster controller, and specifying a load to be handled by the cluster server and then recommending a plan to optimize processing of the specified load, wherein the plan recommends a change in the hardware configuration of the server.

The *Asawa* reference discloses a server cluster and recording data during operation of the server cluster (**Figures 1-3, Col. 2 Lines 48-67, Col. 3 Lines 1-9, Col. 8 Lines 32-63**).

It would have been obvious, to one of ordinary skill in the art, at the time of the invention, to have modified the *Bhat* reference with the *Asawa* reference because (*motivation to combine*) an artisan would be motivated to know of the techniques disclosed in the *Asawa* reference to ensure that the quality of service that the end users (*customers*) experience is good and to ensure that the users (*customers*) of these servers are able to quickly get E-Mail, transfer files and generally get their network service needs taken care of in a timely manner, (***Asawa Col. 1 Lines 12-60***). The Examiner asserts that Information Technology (IT) service hosting is a very competitive industry and that providing the ability to System Administrators to determine if their existing (IT) infrastructure can handle current and projected needs is very critical in being successful in the market place and therefore an artisan would be motivated to learn about the techniques disclosed in the *Asawa* reference.

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The *Bhat* reference discloses that there is a need in the art to meet customer specific needs in client-server environments (**Col. 1 Lines 24-34**).

An ordinary artisan would have been motivated to search the related art for a method of monitoring the performance of a cluster of servers in order to overcome the express deficiencies of the reference in regards to a server cluster performance monitor and a cluster controller. In the related arts of Computer Network Monitoring the *Kutcher* reference discloses performance monitoring of a server cluster (**Figures 1-5, Col. 3 Lines 54-65**).

Thus, it would have been obvious, to one of ordinary skill in the art, at the time the invention was made, to have combined the capacity planning of the *Bhat* reference with the performance monitoring of the *Kutcher* reference because, only by monitoring the performance of an entire cluster of servers is there an accurate assessment of what the true performance will be and this is essential to meet projected needs of a server in order to satisfy present and future performance requirements (**Kutcher Col. 1 Lines 55-65**).

The *Dias et al.* reference discloses specifying a load to be handled by the cluster server and then recommending a plan to optimize processing of the specified load, wherein the plan recommends a change in the hardware configuration of the server (**Figure 2, Figure 4 Item 430, Col. 5 lines 4-23, Col. 7 Lines 33-48, Col. 8 Lines 1-9, Col. 10 Lines 10-35**).

It would have been obvious, to one of ordinary skill in the art, at the time the invention was made, to have combined the capacity planning of the *Bhat* reference with the performance monitoring of the *Dias et al.* reference because, by recommending different hardware configurations, *adding servers to the cluster*, a performance bottleneck can be avoided and the ability to handle increased traffic is accomplished (**Col. 1 Lines 39-53 *Dias et al.***).

**4.2** As regards dependent **Claims 12, 14 and 18** the *Bhat* reference discloses processor utilization (**Figure 2B Item 52**).

**4.3** As regards dependent **Claims 13 and 24** the *Bhat* reference does not expressly disclose deriving general server utilization.

The *Asawa* reference discloses deriving general server utilization (**Col. 8 Lines 32-63**).

It would have been obvious, to one of ordinary skill in the art, at the time of the invention, to have modified the *Bhat* reference with the *Asawa* reference because (*motivation to combine*) an artisan would be motivated to know of the techniques disclosed in the *Asawa* reference to ensure that the quality of service that the end users (*customers*) experience is good and to ensure that the users (*customers*) of these servers are able to quickly get E-Mail, transfer files and generally get their network service needs taken care of in a timely manner, (*Asawa Col. 1 Lines 12-60*). The Examiner asserts that Information Technology (**IT**) service hosting is a very competitive industry and that providing the ability to System Administrators to determine if their existing (**IT**) infrastructure can handle current and projected needs is very critical in being successful in the market place and therefore an artisan would be motivated to learn about the techniques disclosed in the *Asawa* reference.

**4.4** As regards dependent **Claim 16** the *Bhat* reference discloses memory utilization (**Col. 1 Lines 50-67, Col. 2 Lines 1-10**).

**4.5** As regards dependent **Claim 25** the *Bhat* reference discloses (**Col. 2 Lines 30-43**).



5. Dependent **Claims 2, 4, 15, 19 and 20** are being rejected under 35 U.S.C. 103(a) as being unpatentable over **Bhat U.S. patent 5,668,995** in view of **Asawa U.S. Patent 6,108,800** and in further view of **Kutcher U.S. Patent 6,301,615** and in further view of **Dias et al. U.S. Patent 6,317,778** and in further view of **Datta et al. U.S. Patent 6,209,033**.

5.1 As regards the limitations in Independent **Claim 1** see paragraph 4.1 above.

5.2 As regards dependent **Claim 2**, the *Bhat* reference does not expressly disclose displaying server resource estimates and recommending a plan to optimize processing of the specified load.

The *Datta et al.* reference discloses displaying server resource estimates (**Figure 7**), and recommending a way to optimize the network (**Figure 6 Item 64**).

It would have been obvious, to one of ordinary skill in the art, at the time of the invention, to have modified the *Bhat* reference with the *Datta et al.* reference because (*motivation to combine*) the *Datta et al.* reference discloses a method of analyzing alternative configurations (**Col. 2 Lines 48-52**).

5.3 As regards dependent **Claim 4** the *Bhat* reference discloses no-volatile memory (**Figure 1 Item 14**).

5.4 As regards dependent **Claims 15, 19 and 20** the *Bhat* reference does not expressly disclose calculating bandwidth utilization.

The *Datta et al.* reference discloses calculating bandwidth utilization (**Figure 9, Col. 8 Lines 60-67, All of Columns 9-12, Col. 13 Lines 1-26**).

It would have been obvious, to one of ordinary skill in the art, at the time of the invention, to have modified the *Bhat* reference with the *Datta et al.* reference because

(*motivation to combine*) the *Datta et al.* reference discloses a method of analyzing alternative configurations (**Col. 2 Lines 48-52**).

6. Dependent **Claims 5, 6, 7 and 8** are rejected under 35 U.S.C. 103(a) as being unpatentable over **Bhat U.S. patent 5,668,995** in view of **Asawa U.S. Patent 6,108,800** and in further view of **Kutcher U.S. Patent 6,301,615** and in further view of **Dias et al. U.S. Patent 6,317,778** and in further view of **Schwaller et al. U.S. Patent 5,838,919**.

6.1 As regards independent **Claim 1** see paragraph 4.1 above.

6.2 As regards dependent **Claim 5** the *Bhat* reference does not expressly disclose running scripts.

The *Schwaller et al.* reference discloses running scripts (**Figure 7 Items 94, 96, 98, Col. 8 Lines 39-67, all of Columns 9-26**).

It would have been obvious, to one of ordinary skill in the art, at the time of the invention, to have modified the *Bhat* reference with the *Schwaller et al.* reference because (*motivation to combine*) the *Schwaller et al.* reference discloses a method to monitor a networks performance using multiple protocols that more accurately model network performance using actual network conditions (**Col. 3 Lines 10-26**). The *Schwaller et al.* reference is classified in the 709/224 Computer network monitoring section of the Classification manual. An artisan of the Networking Technology Art would be motivated to learn about the techniques disclosed in this area of technology. The Examiner asserts that this area of Information Technology is very competitive and therefore an artisan in this area of art would be motivated to improve the

accuracy of the Network Monitoring and performance evaluation tools being used to measure a particular Network.

6.3 As regards dependent **Claims 6 and 7** the *Bhat* reference does not expressly disclose recalculating the load when the number of users is increased or running a script.

As regards the limitation of running a script (*see paragraph 9.2 above.*)

The *Asawa* reference discloses recalculating the load when the number of users is changed (**Figure 2 Item 66**).

It would have been obvious, to one of ordinary skill in the art, at the time of the invention, to have modified the *Bhat* reference with the *Asawa* reference because (*motivation to combine*) an artisan would be motivated to know of the techniques disclosed in the *Asawa* reference to ensure that the quality of service that the end users (*customers*) experience is good and to ensure that the users (*customers*) of these servers are able to quickly get E-Mail, transfer files and generally get their network service needs taken care of in a timely manner, (*Asawa Col. 1 Lines 12-60*). The Examiner asserts that Information Technology (**IT**) service hosting is a very competitive industry and that providing the ability to System Administrators to determine if their existing (**IT**) infrastructure can handle current and projected needs is very critical in being successful in the market place and therefore an artisan would be motivated to learn about the techniques disclosed in the *Asawa* reference.

6.4 As regards dependent **Claim 8** the *Bhat* reference discloses maximum load (**Col. 5 Lines 14-24**).

**Allowable Subject Matter**

7. **Claims 9, 10, 27, 30-33, 29, 34-37, 39, 40 and 41** are allowed.

7.1 **Claims 21, 22 and 23** are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

**Conclusion**

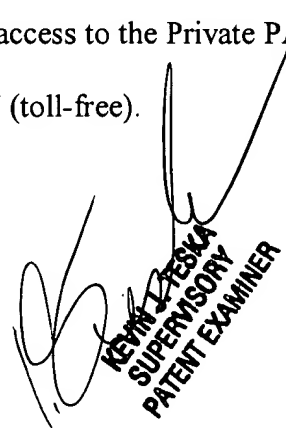
8. Claims 9, 10, 27, 30-33, 29, 34-37, 39, 40 and 41 are allowable over the prior art of record. Claims 21, 22 and 23 are objected to as being based upon a rejected base claim. Claims 3, 2, 4-8, 12-20, 24 and 25, 11 and 17 are rejected. This action is **NON-FINAL**.

8.1 Any inquiry concerning this communication or earlier communications from the examiner should be directed to Dwin M Craig whose telephone number is 703 305-7150. The examiner can normally be reached on 10:00 - 6:00 M-F.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Kevin Teska can be reached on 703 305-9704. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

DMC

  
KEVIN D. TESKA  
SUPERVISORY  
PATENT EXAMINER